INDEX

	Page
Opinion below	1
Grounds of jurisdiction	1
The question presented	2
Statement	2
The statutes involved	3
History of the Osage Indian Reservation	5
Specification of errors to be urged	9
Summary of argument	9
Argument:	
I. The power of the United States to punish offenses committed upon the persons of tribal Indians is not based on exclusive territorial sovereignty and is not limited by the state of the title of the land on which the offense is committed	12
II. A restricted allotment held by a full-blood Osage Indian is Indian country	16
Conclusion	27
Appendix: Osage Allotment Act (Act of June 28, 1906, ch. 3572, 34 Stat. 539)	29

AUTHORITIES CITED

Cases:	
Bates v. *Clark*, 95 U. S. 204	17–19, 25
Cople v. *Oklahoma*, 221 U. S. 559	13
Donnelly v. *United States*, 228 U. S. 243	14, 15, 20
Draper v. *United States*, 164 U. S. 240	14
McCurdy v. *United States*, 264 U. S. 484	24
Pickett v. *United States*, 216 U. S. 456	13
Pronovost v. *United States*, 232 U. S. 487	20
Smith v. *McCullough*, decided by this court March 22, 1926	15
Townsend v. *United States*, 265 Fed. 519	25
United States v. *Bowling*, 256 U. S. 484	22, 23
United States v. *Celestine*, 215 U. S. 278	15
United States v. *Kagama*, 118 U. S. 375	12
United States v. *McBratney*, 104 U. S. 621	14
United States v. *Nice*, 241 U. S. 591	15
United States v. *Osage County*, 251 U. S. 128	16
United States v. *Pelican*, 232 U. S. 442	2, 15, 16, 17, 20–22, 27
United States v. *Sandoval*, 231 U. S. 28	25
United States v. *Soldana*, 246 U. S. 530	25
United States v. *Sutton*, 215 U. S. 291	2
United States v. *Thomas*, 151 U. S. 577	12

	Page
Statutes:	
Act of June 5, 1872, chapter 310, 17 Stat. 228	5
Act of March 3, 1873, chapter 228, 17 Stat. 530, 538	5
Act of January 30, 1897, chapter 109, 29 Stat. 506	25
Act of March 3, 1909, chapter 256, 35 Stat. 778	7
Act of March 3, 1921, chapter 120, 41 Stat. 1249	7
Act of February 27, 1925, chapter 359, 43 Stat. 1008	8
Criminal Appeals Act, chapter 2564, 34 Stat. 1246	2
Criminal Code:	
Section 272	4
Section 273	4
General Allotment Act of February 8, 1887, chapter 119, section 6, 24 Stat. 388, 390	15
Indian Intercourse Act of June 30, 1834, chapter 161, 4 Stat. 729	17
Oklahoma Enabling Act, section 1 (Act of June 16, 1906, ch. 3335, 34 Stat. 267)	14
Osage Allotment Act of June 28, 1906; chapter 3572, 34 Stat. 539	4, 5, 6, 15
Revised Statutes, section 2145	3, 4, 13, 17
Indian treaties:	
Treaty of December 29, 1835 (proclaimed May 23, 1836), 7 Stat. 478	5
Treaty of July 19, 1866, article 16 (proclaimed August 11, 1866), 14 Stat. 799, 804	5

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1061

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JOHN RAMSEY AND WILLIAM K. HALE

IN ERROR OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinions delivered in the District Court are not officially reported. They are found at R. 6 and 7.

GROUNDS OF JURISDICTION

The judgment to be reviewed was entered March 1, 1926. (R. 5.) The lower court sustained demurrers to the indictment. The indictment charged the defendants with the crime of murder of an Indian in the Indian country. (R. 2.) It was based on Section 2145 of the Revised Statutes, providing that the laws of the United States as

to punishment of crimes " shall extend to the Indian country." The District Court held that because the land in the Osage Indian reservation, on which the crime was committed, was a restricted allotment, instead of a trust allotment, it was not Indian country, within the meaning of Section 2145 of the Revised Statutes. (R. 6.) The case is properly here on writ of error, sued out by the United States under the Criminal Appeals Act, Chap. 2564, 34 Stat. 1246, because the decision below involved the construction of a statute on which the indictment was founded. *United States* v. *Sutton,* 215 U. S. 291; *United States* v. *Pelican,* 232 U. S. 442.

THE QUESTION PRESENTED

The question presented is whether that part of the Osage Indian reservation on which the crime was committed ceased to be Indian country, within the meaning of Section 2145 of the Revised Statutes, extending the criminal laws of the United States to the Indian country, because held as a restricted allotment instead of as a trust allotment.

STATEMENT

The defendants in error, white men, were indicted in the United States District Court for the Western District of Oklahoma. They were charged, one with murdering, and the other with aiding and abetting the murder of, Henry Roan, a full-blood Osage Indian and a legal member of the Osage tribe. (R. 2.) The indictment stated that

the crime was committed "in Osage County, in said district, in the Indian country and in and upon the reservation theretofore and then established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land therein which was then and there under the executive [exclusive] jurisdiction of the United States and comprised a restricted surplus allotment, theretofore made under and according to the act of Congress approved June 28, 1906, * * * the title to which said allotment * * * was held in trust by the United States and was inalienable," by Rose Little Star, the allottee, who had never received a certificate of competency authorizing her to sell it. (R. 2.)

The defendants in error filed demurrers (R. 4, 5) to the indictments on the ground that the place where the crime was committed was not in the Indian country within the meaning of Section 2145, Revised Statutes, extending the application of the criminal laws of the United States to the Indian country, and that the indictment therefore stated no offense against the laws of the United States. The demurrers to the indictments were sustained on this ground. (R. 5.)

THE STATUTES INVOLVED

Section 2145 of the Revised Statutes of the United States provides as follows:

> Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to

the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 273 of the Criminal Code is as follows:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Section 272 of the Criminal Code provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof * * *.

The Osage Allotment Act of June 28, 1906, Chap. 3572, 34 Stat. 539, is in the Appendix to this brief.

HISTORY OF THE OSAGE INDIAN RESERVATION

The title to what afterwards became the Osage Indian reservation was originally held by the Cherokee Nation of Indians by virtue of letters patent signed by President Van Buren on December 31, 1858, pursuant to the provisions of a treaty with the Cherokees concluded December 29, 1835, and proclaimed May 23, 1836 (7 Stat. 478). Pursuant to Article 16 of its treaty with the United States concluded July 19, 1866, and proclaimed August 11, 1866 (14 Stat. 799, 804), the Act of Congress approved June 5, 1872 (Chap. 310, 17 Stat. 228), and the Act of Congress approved March 3, 1873 (Chap. 228, 17 Stat. 530, 538), the Cherokee Nation on June 14, 1883, executed a deed to this land to the United States "in trust for the use and benefit of the Osage and Kansas Indians." The lands thus conveyed were specifically set apart and confirmed as a reservation for the Osage Tribe of Indians by the Act of June 5, 1872, and from that time until the Osage Allotment Act of June 28, 1906, this reservation was occupied in common by the members of the Osage tribe. The Osage Allotment Act of 1906 provided for the division of the lands and funds of the Osage Indians, for establishing a tribal roll, and the creation of an allotting commission, and each member of the tribe was permitted to make three selections of tracts of 160 acres each, one to be known as a homestead and the others as surplus allotments. The oil, gas, coal, and other minerals in the allotted lands were reserved to the

tribe for a period of 25 years. The homestead allotments were made inalienable until otherwise provided by Congress, and the surplus allotments were made inalienable for a period of 25 years, unless a certificate of competency should be sooner issued to the allottee. The tribal organization was continued by the Act.

Subdivision Fourth of Section 2 of the Act referred to "certificate of allotment" as well as deed. Section 5 provided (34 Stat. 544):

> That at the expiration of the period of twenty-five years * * * the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, * * * and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, * * * and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

Although the Act seems to have contemplated that after the selections were made certificates of allotment should issue and that the legal title should remain in the United States in trust until the restrictions against alienation were removed by expiration of time or earlier issuance of certificate of competency, and that the deeds should be issued when the restrictions were thus removed, the Interior Department seems to have construed the statute to provide for the immediate issuance of deeds

to the allottees subject to the restrictions against alienation, and this construction was followed and deeds to the allotments were issued to the respective allottees, and the lands have been held as restricted allotments.

The continued control which the United States has since exercised over the Osage Indians and the allotted lands so conveyed to them is disclosed by the following statutes.

By the Act of March 3, 1909, Chap. 256, 35 Stat. 778, it was provided:

> That the Secretary of the Interior be, and he hereby is, authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and Osage tribes of Indians in Oklahoma: *Provided,* That the sales of the Osage lands shall be subject to the reserved rights of the tribe in oil, gas, and other minerals.

By the Act of March 3, 1921, Chap. 120, 41 Stat. 1249, the reservation to the Osage tribe of the oils and minerals in the allotted lands which by the Act of 1906 was to be effective until 1931, was extended to April 7, 1946. By Section 3 of that Act the members of the Osage tribe of Indians were declared to be citizens of the United States, but there was no provision in the Act subjecting them to the laws of the State. There were other provisions

in the Act relating to the disposition of the income of the members of the tribe.

By the Act of February 27, 1925, Chap. 359, 43 Stat. 1008, Congress dealt further with its wards of the Osage tribe and with their income and property. It provided, in Section 3, that lands devised to members of the tribe who did not have certificates of competency should be inalienable without the consent of the Secretary of the Interior. It provided that the property of Osage Indians not having certificates of competency should not be subject to the lien of any debt, claim, or judgment, except taxes, without the approval of the Secretary of the Interior. By Section 4 it was provided that certificates of competency theretofore issued might be revoked, without prejudice to the legality of any transactions theretofore made by reason of the issuance of the certificate. Section 7 provided that none but heirs of Indian blood should inherit from members of the Osage tribe of one-half or more Indian blood, any right, title or interest in and to the restricted lands.

By reason of the issuance of certificates of competency and resulting conveyances by competent allottees, the title to some portions of the reservation has passed to whites and others not members of the tribe. The greater portion of the reservation is still held in the form of restricted allotments by members of the tribe.

The Osage Indians still retain their tribal organization. They are in the course of being con-

ducted from a state of dependent wardship to one of full emancipation, and are in a "period of transition." They are still wards of the United States, and the United States has retained guardianship over their persons as well as over their property, and has assumed to exercise the same control over the restricted allotments as if in the form of trust allotments.

SPECIFICATION OF ERRORS TO BE URGED

1. The District Court erred in holding that the restricted allotment described in the indictment and on which the crime was committed is not Indian country within the meaning of that term as used in Section 2145 of the Revised Statutes.

2. The District Court erred in holding that land in the Osage Indian reservation, allotted to and conveyed to a member of the tribe as a restricted allotment, ceased to be Indian country because a "restricted" allotment rather than a "trust" allotment, and because the title had been conveyed to the Indian by deed and was not held by the United States in trust.

3. It erred in sustaining the demurrers to the indictment.

SUMMARY OF ARGUMENT

I. The power of Congress to punish crimes committed upon the person of a tribal Indian is not founded on exclusive sovereignty over the place where the crime is committed. It rests upon the

power of the United States over the subject matter and exists because tribal Indians are wards of the United States whom it has power to protect.

The power of the United States is therefore not dependent upon the fact that the crime is committed in or out of Indian country, and is not affected by the state of the title of the land on which the offense is committed.

While the power is not limited territorially, Congress has seen fit to exercise it only to the extent of punishing offenses against Indians when committed in what it has described as Indian country, and the question is, what Congress has intended by that term.

II. The term "Indian country," as used in Section 2145 of the Revised Statutes, originally described lands occupied by Indian tribes and outside of the States and organized Territories. It was later understood to include Indian reservations, within the boundaries of States, set apart for Indian tribes. The land in Indian reservations has been held not to have lost its character as Indian country by its allotment in severalty, where the United States holds the title in trust for the allottee, and there is no reason why any different rule should apply to restricted allotments under a system where title has been conveyed to the allottee, subject to restrictions as to alienation and other control by the United States. To be Indian country, it is sufficient if the lands

still belong to the Indians, provided its alienation is restricted and the United States has reserved control over the Indian interest, and the Indian owners have not dissolved the tribal relation and are still wards of the United States.

The Osage Indians are in a period of transition, and are being conducted from a state of dependent wardship to one of full emancipation, but they are still wards of the United States whom it has a duty and a power to protect; and the murder of a member of the Osage Indian tribe is an offense which the United States has power to punish, and it has intended to exercise that power where the offense is committed within Indian country.

The narrow question in this case is whether there is any such essential difference between land held under a "trust allotment" and which has been held to be Indian country, and land held under a "restricted allotment," as to justify the conclusion that the latter has lost its character as Indian country.

There is no substantial difference in the nature of the Indian interest. The alienation in either case is effectually restricted, and as to one class of allotments as much as the other the United States possesses a supervisory control over the land. In either case, by force of circumstances, the Indian is tied to the land on which the United States has placed him, and for that reason the duty and therefore the intention to protect him exists.

ARGUMENT

I

THE POWER OF THE UNITED STATES TO PUNISH OFFENSES COMMITTED UPON THE PERSONS OF TRIBAL INDIANS IS NOT BASED ON EXCLUSIVE TERRITORIAL SOVEREIGNTY AND IS NOT LIMITED BY THE STATE OF THE TITLE OF THE LAND ON WHICH THE OFFENSE IS COMMITTED

The decision of the District Court seems to have been influenced by the idea that the power of the United States to punish offenses against tribal Indians is in some way dependent upon the title to the land on which the offenses are committed.

The question here presented is not one of power, but one of intention. The power of the United States to define and punish crimes committed upon the persons or property of tribal Indians exists without regard to the place where the crime is committed. The power is one over the subject matter and not based on exclusive territorial sovereignty. It exists because the Indians are wards of the United States with respect to which there has arisen "the duty of protection, and with it the power." *United States* v. *Kagama*, 118 U. S. 375, 384; *United States* v. *Thomas*, 151 U. S. 577.

The United States has the power, if Congress sees fit to exercise it, to protect tribal Indians, who are its wards, by punishing offenses committed upon their persons or property, whether in or off an Indian reservation or in or out of Indian country.

Section 2145 of the Revised Statutes, originally enacted in 1834, provides that the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States shall extend to the Indian country. As applied to what was then defined as Indian country, all of which was outside the boundaries of the States, the United States had exclusive territorial sovereignty, and the effect of the statute was to make the laws of the United States punishing crimes operative on every person in that territory, whether white, black, or Indian.

This was so with respect to the land afterwards forming the Osage Indian reservation. Upon the admission of the State of Oklahoma to the Union, the United States lost its exclusive territorial sovereignty over the land within the Osage Indian reservation. By virtue of the rule of equality between the States admitted to the Union, no reservation of exclusive territorial sovereignty over land within the limits of the State was or could have been made as a condition to the admission of the State. *Coyle* v. *Oklahoma,* 221 U. S. 559; *Pickett* v. *United States,* 216 U. S. 456. The effect of the admission of the State was therefore to limit the application of the criminal laws of the United States, which had been extended by Section 2145 to all persons in the Indian country, to those cases where Congress has the constitutional power to

punish offenses committed in places over which the State and the Federal Government exercise concurrent jurisdiction within their respective spheres. No longer was an offense committed by a white man upon a white man in the Osage Indian reservation punishable under the laws of the United States. *Draper* v. *United States*, 164 U. S. 240; *United States* v. *McBratney*, 104 U. S. 621.

Section 1 of the Enabling Act under which Oklahoma was admitted to the Union provided (Act of June 16, 1906, Chap. 3335, 34 Stat. 267):

> That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

This provision probably added nothing to the powers of the United States.

That the United States retained the power to punish offenses committed by or against Indians within the State of Oklahoma is settled, but that power has its sanction in the duty and power of the United States to protect members of the Indian tribes under its guardianship. *Donnelly* v. *United*

States, 228 U. S. 243; *United States* v. *Pelican*, 232 U. S. 442.

Members of the Osage tribe are still under guardianship of the United States. Their tribal relations have not been dissolved and the wardship is not ended. The Osage Allotment Act of 1906 discloses that although the lands were to be allotted in severalty, the tribal relation, though ultimately to be dissolved, was not broken up by the making or taking of allotments, and the emancipation was only partial and not complete, and the wardship still continues. *United States* v. *Nice*, 241 U. S. 591.

To use an expression of this Court in *Smith* v. *McCullough* (decided March 22, 1926), the Osages are Indians who are "being conducted from a state of dependent wardship to one of full emancipation and needed to be safeguarded against their own improvidence during the period of transition."

When the members of the Indian tribes shall be completely emancipated and released from the guardianship, and consequently taken out from under the protection of the United States, is a matter for Congress to decide. *United States* v. *Celestine*, 215 U. S. 278. Congress has not made that decision with respect to the Osage Indians and in the Osage Allotment Act did not, as in Section 6 of the General Allotment Act of February 8, 1887, Chap. 119, 24 Stat. 388, 390, provide that upon the patenting of the lands to the Indians they "shall have the

benefit of and be subject to the laws, both civil and criminal, of the State" in which they reside, and legislation subsequent to the Osage Allotment Act of 1906 with respect to members of the Osage Indian tribe and their property, set forth in the statement of facts, discloses that the guardianship over their persons and property has been actively continued. *United States* v. *Osage County,* 251 U. S. 128.

The indictment, in charging the murder of a full-blood Osage Indian, who was a member of the Osage Indian tribe, therefore charges the murder of an Indian under the guardianship of the United States with respect to whom the United States had the duty and the power of protection.

The only question in the case is whether Congress has seen fit to exercise the power, and that depends on the construction of the term "Indian country" in Section 2145 of the Revised Statutes.

II

A RESTRICTED ALLOTMENT HELD BY A FULL-BLOOD OSAGE INDIAN IS INDIAN COUNTRY.

The question in this case is a very narrow one. In *United States* v. *Pelican,* 232 U. S. 442, it was held that land in an Indian reservation did not lose its character as Indian country where allotted in severalty, the title to be held in trust by the United States for 25 years for the sole benefit of the allottees, during which period the title was to be inalienable, and at the expiration of which the

title of the Indians was to become absolute and evidenced by conveyances to them. The situation in the case at bar differs from the *Pelican case* only in the fact that when the surplus allotments were made to the Osage Indians, deeds to the allotted tracts were made to them with the provision that the title should be inalienable by the Indian for 25 years, unless a certificate of competency were earlier issued.

The statute now found as Section 2145 of the Revised Statutes, extending the general laws as to punishment of crimes to the Indian country, was part of the Indian Intercourse Act, being the Act of June 30, 1834, Chap. 161, 4 Stat. 729. That statute defined the term "Indian country" as follows:

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

That definition was not reenacted in the Revised Statutes, and Congress has not since undertaken to define the term.

In *Bates* v. *Clark,* 95 U. S. 204, 206–207, it is said:

> Though many statutes concerning intercourse with the Indians and prescribing offences within the Indian country were

passed, no other attempt to define what was Indian country was made by Congress until the act of 1834, the first section of which we have given *verbatim*. In the meantime, we had purchased the country west of the Mississippi, and had organized two States and a Territory there, and most of the Indians with whom we had to deal lived there. The country east of the Mississippi, and not within any State, was the region north of Illinois and Indiana, and north-west of Ohio, now constituting the States of Michigan and Wisconsin, and then under the government of the Michigan Territory.

Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fine, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offences were not committed in the Indian country as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian coun-

try, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then.

The Court further said (page 207):

> If the section which we have given *verbatim* be read with a comma or semicolon inserted after the word "State," or if, without the insertion of any point there, we read it so as to apply the words, "to which the Indian title has not been extinguished," to all the region mentioned in the section, we have a criterion which will always distinguish what is Indian country from what is not, *so long as the existing system governing our relations with Indians is continued.* (Italics ours.)

And again the Court said (page 208):

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

The question whether the Indian title has been extinguished was not the only test mentioned by the Court. That criterion was said to be applicable

> restored to the public domain. The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control.

The only question remaining in this case, therefore, is whether the fact that the Osage allotments were evidenced by deeds to allottees with restrictions against alienation deprived the lands of the character as Indian country which they would have had if a certificate of allotment had been made and the legal title held in trust by the United States until the time fixed for termination of the restrictions.

Every reason advanced in *United States* v. *Pelican, supra,* in support of the view that trust allotments are Indian country applies with equal force to restricted allotments.

In *United States* v. *Bowling,* 256 U. S. 484, at page 486–487, the Court said:

> Before coming to the acts under which the Secretary of the Interior proceeded, it will be helpful to refer to the modes, long in use, by which Indians are prevented from improvidently disposing of allotted lands. One is to issue to the allottee a written instrument or certificate, called a trust patent, declaring

> that the United States will hold the land for a designated period, usually twenty-five years, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period will convey the same to him, or his heirs, in fee, discharged of the trust and free of all charge or incumbrance. The other is to issue at once to the allottee a patent conveying to him the land in fee and imposing a restriction upon its alienation for twenty-five years or some other stated period. While alienation is effectually restricted by either mode, allotments under the first are commonly spoken of as trust allotments and those under the second as restricted allotments. As respects both classes of allotments—one as much as the other—the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction.

The Osage Allotment Act of 1906 is so phrased as to justify the conclusion that Congress intended that certificates of allotment should be issued to the allottees and that the title to the land should be held in trust by the United States, deeds to the allottees to be issued only when the restrictions against alienation were removed by lapse of time or certificate of competency. If that be the proper con-

struction of the Act, the making of deeds, prior to the removal of restrictions on alienation, was unauthorized, and the case could be treated as if the title to allotted lands of incompetents was still held in trust by the United States. The Act was given a different interpretation and the deeds were issued. (See *McCurdy* v. *United States,* 264 U. S. 484.) However, this point is of no importance. We utterly fail to see how the difference between a trust allotment and a restricted allotment can make the difference between what is Indian country and what is not, within the meaning of the statute under consideration. The Indian title has not been extinguished by a restricted allotment any more than by a trust allotment. The interest of the Indian is equally subject to the control of the United States. In the present case, there was reserved to the tribe in common ownership the minerals and oils in all of the allotted lands for a period of 25 years. Congress has since enacted a statute extending the tribal reservation to oils and minerals for an additional 20 years, notwithstanding that the allotments were evidenced by deeds. It has enacted a statute changing the rule of descent with respect to the restricted allotments, and it has retained and exercised control over these restricted allotments as fully as it has over trust allotments.

Congress has recognized that restricted allotments are "Indian country" as well as trust allotments.

In the Act of January 30, 1897 (Chap. 109, 29 Stat. 506), is prohibited the introduction of

> intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, *or while the same shall remain inalienable by the allottee without the consent of the United States.* (Italics ours.)

Congress also declared lands held by the Pueblo Indians in communal ownership in fee simple under grants from the King of Spain to be Indian country within the meaning of a statute prohibiting introduction of liquor into the Indian country. *United States* v. *Sandoval,* 231 U. S. 28, 48.

In *United States* v. *Soldana,* 246 U. S. 530, it was held that the grant of an easement for railway purposes over Indian lands did not extinguish the Indian title to the land or destroy its character as Indian country. The Circuit Court of Appeals for the Eighth Circuit has held that the restricted Osage allotments are Indian country. *Townsend* v. *United States,* 265 Fed. 519.

The term "Indian title," the extinguishment of which was stated in *Bates* v. *Clark, supra,* to be the criterion for distinguishing what is Indian country from what is not, evidently was intended to describe the kind of title which an Indian holds when subject to control and guardianship of the United States, whether in severalty, or in common with other members of his tribe.

The reason for enacting laws protecting the Indian in Indian country is because Indian country is a place set apart by the United States for the occupancy of Indians, in which they have been placed by the United States, and from which by force of circumstances they are unable to remove, until fully emancipated, because they are not authorized to sell their lands. It is because they have been placed in certain localities, and in effect bound to the land without ability to move, that the United States has felt bound to protect them by adequate legislation while located where the United States has placed them. So long as the restrictions on the alienation of their property are not removed, and their tribal relation is not dissolved, the reasons continue for protecting them against crimes upon their persons and property, and those reasons exist whether their lands are held as " trust allotments " or " restricted allotments."

The trial court evidently supposed that the power to punish crimes against Indians depended upon the title of the United States to the land on which the offense was committed, and therefore assumed that because the United States had conveyed the legal title it had not retained jurisdiction over the soil. This, as has been shown, is based on the erroneous conception that the power of the United States to protect tribal Indians is founded on exclusive territorial sovereignty or jurisdiction.

The only other way to account for the decision of the trial court is to conclude that it construed the case of *United States* v. *Pelican* as holding that land in Indian reservations ceases to be Indian country where allotted in severalty, unless in the form of trust allotments with reservation of legal title in the United States. The *Pelican case* held that the land continued to be Indian country, notwithstanding the trust allotment method was used, but it did not lay down any rule to the effect that allotments in severalty by deed, with restrictions on alienation and reservations of control by the United States would deprive the land of its character as Indian country.

CONCLUSION

Henry Roan, described in the indictment as a full-blood Indian and a legal member of the Osage tribe, was a ward of the United States, the murder of whom the United States had power to punish. The offense was punishable under the laws of the United States if committed in Indian country, and the land on which the offense was committed and which was included in the restricted allotment of Rose Little Star, a member of the Osage tribe, to whom a certificate of competency had not been issued, and whose allotment was inalienable and remained undisposed of by her, was Indian country within the meaing of Section 2145 of the Revised Statutes, and the difference between a restricted

allotment and a trust allotment presents no reason or basis for the view that one constitutes Indian country and the other does not. The demurrers to the indictment should have been overruled.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
OSCAR R. LUHRING,
Assistant Attorney General.
ROY ST. LEWIS,
United States Attorney.

APRIL, 1926.